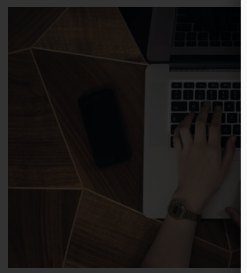
Even He... Not Be R...



three-Judge Bench c... Ashok Bhushan an... reiterating the time-t... penalty is the exception' has laid down clearly that even when a crime is heinous or brutal, it may not still fall under the rarest of rare category. It has held categorically and convincingly that, 'Time and again, this Court has categorically held that life imprisonment is the rule and death penalty is the exception and even when the crime is heinous or brutal, it may not still fall under the category of rarest of rare'. Very rightly so!

It may be recalled that even earlier also the Apex Court has time and again emphasized that death penalty is to be awarded only in the 'rarest of rare' cases but this is what many times the High Court perhaps tend to overlook which culminates in the Apex Court reiterating its time-tested position once again on

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death penalty! In this case, the death penalty awarded to Sukhlal was commuted who was found guilty of murdering a lady in whose house he was working as a gardener. All the courts must always adhere by what the Apex Court keeps reiterating time and again! We saw how on November 28 in the landmark case titled Chhannu Lal Verma v The State of Chhattisgarh in Criminal Appeal No(s). 1482-1483 of 2018 [arising out of S.L.P. (Criminal) No(s). 5898-5899 of 2014], a three-Judge Bench of Apex Court comprising of Justice Kurian Joseph, Justice Deepak Gupta and Justice Hemant Gupta commuted the death penalty awarded to a man convicted for the murder of three persons. It rightly held that proper psychological/psychiatric evaluation to assess probability and possibility of reform of criminal needs to be done before awarding death sentence.

To be sure, it may again be recalled that in the past also on November 14, 2018 the Apex Court Bench comprising of Justice NV Ramana, Justice Mohan M Shantanagoudar and Justice Mukeshkumar Rasikbhai Shah in Vijay Kumar v The State of Jammu & Kashmir in Criminal Appeal Nos. 1391-1393 of 2018 [arising out of SLP (Crl.) Nos. 6454-6456 of 2014] while commuting the death sentence imposed on a man convicted in a triple murder case, in which the victims were minor children held that, 'The offence has undoubtedly been committed which can be said to be brutal but does not warrant death sentence. It is required to be noted that the accused, as such, is not a previous convict or a professional killer.' Not just this, on November 15, the same Bench of Apex Court in Swapan Kumar Jha @ Sapan Kumar v State of Jharkhand & Anr in Criminal Appeal Nos. 1396-1397/2012 again commuted a death sentence awarded to a man for kidnap and murder of his cousin. In Tattu Lodhi @ v State of Madhya Pradesh in Criminal Appeal Nos. 292-293 of 2014, the Apex Court Bench comprising of Justice J Chelameswar, Justice Shiva Kirti Singh and Justice Abhay Manohar Sapre yet again on September 16, 2016 commuted the death penalty in 7 year-old-girl rape and murder case.

It cannot be lost on us that there are many such instances where the Apex Court favoured this same approach. As for instance, in September 2016 alone we find

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that the death penalty awarded to seven persons by High Courts for committing heinous crimes like rape and murder were commuted by the Apex Court! Even in November 2018 itself we find that seven death penalties were commuted!

Now coming back to this case itself which we are discussing, let us start from the scratch. While granting leave, the Apex Court observed that, 'These appeals are filed against the Judgment of the High Court of Madhya Pradesh dated 11.08.2014 confirming the death sentence awarded to the appellant by the 12th Additional Sessions Judge, Indore vide its judgment in Sessions Trial No. 464/2013 dated 30.05.2014. The appellant has challenged both the conviction and the sentence.'

To recapitulate, the Apex Court Bench then elucidates on the background of the case by observing clearly and convincingly that, 'The factual matrix of the case is as follows. The appellant was working as a Mali (gardner) in the house of Sharad Agrawal and Jyoti Agrawal at the time of incident. The incident is alleged to have taken place about 4 or 5 p.m. of 20.03.2013. A few days before the incident, the appellant had suffered a cut injury by a glass splinter on his foot while cleaning the bath room. The injury had become septic and on the date of the incident the appellant was demanding from deceased Jyoti Agrawal money for treatment of his injured foot. This led to some acrimony between the appellant and deceased Jyoti Agrawal, as also deceased Sharad Agrawal, who had come in the meantime. This was witnessed by Asha Thakur (PW-II) (domestic help). Later on, at about 8.30 p.m. Asha Thakur after going out of the house returned and was shocked to see blood stains from the entry door to the hall. Being panic stricken she rushed out of the house and while doing so she saw accused hiding behind a curtain near dining table; the appellant accosted her but she refused and went away from the house. She returned at 1 a.m. (at night) to the house to find a crowd gathered.'

Going forward, the ball is set rolling by pointing out further in this judgment that, 'The criminal machinery was set into motion by filing FIR at the Police Station Rajendra Nagar by Ravindra Gujjar, Constable (PW-1). The trial court after appreciating the entire evidence placed on record and examining of the witnesses found the appellant guilty of the offences charged and sentenced him to death by hanging under Section 302 of the Indian Penal Code ('IPC' for short) for the death of both Sharad Agarwal and Jyoti Agarwal as also sentenced to fine of Rs 1,000/- for each offence under Section 302 IPC. The appellant was further convicted for 10 years R.I. under Section 394 IPC read with Section 397 IPC and fine of Rs. 5,000/- with default stipulation of six months R.I. on failure to pay the fine.'

As it turned out, the Apex Court Bench then brings out that, 'On appeal, the High Court after reappreciating the entire evidence placed on record, the Medical evidence and taking into consideration the circumstances accepted the evidence of Asha Thakur (PW-II) and held that the charges under Section 302 IPC are proved against the accused beyond reasonable doubt. Insofar as charges under Section 394 read with Section 397 of the IPC are concerned, the High Court has also upheld the findings of the lower court in this behalf. On the aspect of sentence, the High Court opined that it would come in the category of rarest of rare cases and therefore the appellant deserves to be given capital sentence on this count. Resultantly, the High Court dismissed the appeals of the appellant and maintained the convictions and affirmed the sentence of death and other sentences awarded to the appellant.'

Having said this, the judgment then goes on to mention the version of appellant by stating that, 'Learned counsel for the appellant pointed out that the High Court has erred in not considering that Asha Thakur (PW-11) is not an eyewitness to the incident. She did not inform the police immediately despite claiming to have seen the appellant at the scene of the crime. The conduct of Asha Thakur (PW-11) is not natural and cannot be the basis for conviction of the appellant. It is also submitted by the learned counsel for the appellant that the statement of the

appellant under Section 27 of the Evidence Act cannot be the basis to hold that the appellant is guilty under Section 302 of the IPC. Insofar as award of sentence is concerned, learned counsel for the appellant submits that the High Court has erred in not considering that the present case does not fall within the ambit of the test of rarest of rare cases as laid down by this Court. The High Court has also not considered that the appellant was only 23 years of age at the time of the incident and has no criminal history and therefore it cannot be held that there is no reason to believe that the appellant cannot be reformed or rehabilitated and that he is likely to continue to be a menace to the society. While upholding the findings of the trial court, the High Court has not considered the tests laid down by this Court in Bachan Singh vs. State of Punjab reported in (1980) 2 SCC 684 that the death sentence should be awarded only where the option of awarding the sentence of life imprisonment was unquestionably foreclosed. Learned counsel further submits that there is absolutely no material to suggest that this is the position in the facts of the present case. Learned counsel pointed out that after pronouncement of the judgment of conviction, the appellant was asked if he had anything to say on the question of sentence, the order of death sentence was also passed on the same day by the Additional Sessions Judge in violation of the guidelines laid down in Bachan Singh (supra) and the appellant should have been given sufficient time to adduce evidence in mitigation and thereafter to be heard on the question of sentence. Hence award of death sentence by the trial court and confirmed by the High Court is contrary to law.'

Truth be told, the judgment then goes on to illustrate what the respondent submitted. It says that, 'On the other hand, learned counsel for the respondent submits that the High Court has rightly relied on the testimony of Asha Thakur (PW-11), the CCTV footage and also other circumstantial evidence and recorded concurrent findings of fact upholding the conviction of the appellant as also confirmed the sentence of death punishment awarded by the trial court. Learned counsel for the respondent submits that the reason behind Asha Thakur (PW-11) did not inform the authorities promptly because she panicked and became nervous on seeing so much blood in the house, hence the delay is incumbent to

happen in normal circumstances. She further submits that insofar as the CCTV footage is concerned, though the faces of the persons therein are not clear, but the person wearing white Jerkin is none other than the accused or appellant herein. The finger prints of the appellant herein were found on the scene of the crime supports the prosecution case and links to the circumstantial chain which led to the conviction of the appellant. Therefore, the entire chain of the prosecution case is complete and proved beyond reasonable doubt.'

Most importantly, after considering all the facts and arguments placed before it by both the appellant and the respondent, the Bench of Apex Court while pronouncing its landmark and laudable judgment held in no uncertain terms that, 'After hearing the learned counsel for the parties and keeping in view the facts and circumstances of the case as also the evidence placed on record, we are of the considered opinion that insofar as the conviction of the appellant under Section 302 of the Indian Penal Code is concerned that is rightly arrived at by the trial court and confirmed by the High Court as the offence is proved beyond reasonable doubt by leading satisfactory evidence by the prosecution. However, insofar as award of death penalty by the Sessions Court, which has been upheld by the High Court, is concerned, we are of the opinion that the High Court has erroneously affirmed death penalty without correctly applying the law laid down by this Court in Bachan Singh (supra). Time and again, this Court has categorically held that life imprisonment is the rule and death penalty is the exception and even when the crime is heinous or brutal, it may not still fall under the category of rarest of rare. The decision to impose the highest punishment of death sentence in this case does not fulfil the test of 'rarest of rare case where the alternative option is unquestionably foreclosed'. Bachan Singh (supra) in no unequivocal terms sets out that death penalty shall be awarded only in the rarest of rare cases where life imprisonment shall be wholly inadequate or futile owing to the nature of the crime and the circumstances relating to the criminal. Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty. In view of the above, while upholding the conviction of the appellant awarded by the Sessions Court and confirmed by

the High Court, we commute the death sentence to that of life imprisonment with a cap of 18 years. The appeals are partly allowed to the aforesaid extent.'

All said and done, there cannot be an iota of doubt that all courts must always follow this basic principle on sentencing of death penalty laid down by the highest court of the land as laid down in this landmark case and restrain from awarding it frequently at the drop of a hat! Also, adequate and reasonable reasons must be given for awarding of death penalty as was held by the Bench of Apex Court comprising of Justice AK Sikri, Justice Ashok Bhushan and Justice Indira Banerjee on November 1, 2018 in the landmark judgment titled Jitendra @ Jeetu v State of Madhya Pradesh & Others in Review Petition (Criminal) No. 324 of 2015 in Special Leave Petition (Criminal) No. 111 of 2015 while commuting the death sentence imposed on rape accused in two different cases by recalling its earlier orders by which it had dismissed the SLPs filed by them in limine. It also very rightly held that Special Leave Petitions filed in those cases where death sentence is awarded by the courts below should not be dismissed without giving reasons. There is no reason why these basic principles laid down for sentencing while punishing should not be followed by all the courts in India from top to bottom!

Sanjeev Sirohi
on 07 January 2019

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Rajendra Pal 21 January 2019
Thanks a lot for hard work

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